Supreme Court, U.S.
FILED
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95 398 SEP 11 1995
No. 95-
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In the

Supreme Court of the United States

October Term, 1995

Daniel A. Boudreau,

Petitioner,

V.

United States of America,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED

Does the immunity provision of the Flood Control Act of 1928, 33 U.S.C. § 702c, preclude the United States from ever being liable for personal injuries occurring at flood control lakes or facilities?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 2

I. The Longstanding Split on Flood Control Immunity Continues to Become More Aggravated and Extreme 2

II. The Split in Judicial Reasoning Has Continued to Widen As Well 4

A. The Wholly Unrelated Test 5

B. The Ordinary Meaning Test 6

C. The Nexus With Flood Control Test 7

D. The Substantial Factor Test 8

E. The Increased Probability of Injury Test 9

F. The Other Operations Test 10

III. The Decision of the Court of Appeals Perpetuates Error . 11

IV. The Issue is Important 12

CONCLUSION 12

TABLE OF AUTHORITIES

CASES CITED — PAGE

Bailey v. United States,
35 F.3d 1118 (7th Cir. 1994) 3, 10

Boyd v. United States,
881 F.2d 895 (10th Cir. 1989) 3, 7, 8

Cox v. United States,
827 F.Supp. 378 (N.D. W.Va. 1992) 3, 8

Dawson v. United States,
894 F.2d 70 (3rd Cir. 1990) 3, 8, 9

Denham v. United States,
646 F. Supp. 1021 (W.D. Tex. 1986),
aff'd, 834 F.2d 518 (5th Cir. 1987) 3, 10

Dewitt v. United States,
878 F.2d 216 (8th Cir. 1989) 3, 9

Fisher v. United States,
31 F.3d 683 (8th Cir. 1994) 3

Fryman v. United States,
901 F.2d 79 (7th Cir. 1990) 3, 8, 9, 10

Graci v. United States,
456 F.2d 20 (5th Cir. 1971) 7

Hayes v. United States,
585 F.2d 701 (4th Cir. 1978) 5, 7, 10

Henderson v. United States,
965 F.2d 1488 (8th Cir. 1992) 3, 4, 8, 10

Hiersche v. United States,
112 S.Ct. 1304 (Mar. 9, 1992) 3, 4, 12

Holt v. United States,
46 F.3d 1000 (10th Cir. 1995) 8

McCarthy v. United States,
850 F.2d 558 (9th Cir. 1988) 3, 6, 8

Mocklin v. Orleans Levee District,
877 F.2d 427 (5th Cir. 1989) 3, 6, 7

Morici v. United States,
681 F.2d 645 (9th Cir. 1982) 5, 6

Respess v. United States,
586 F.Supp. 861 (E.D. La. 1984) 11

Swain v. United States,
825 F.Supp 966 (D.Kan. 1993) 3, 9

United States v. James,
478 U.S. 597, 106 S.Ct. 3116 (1986) 3, 6, 7, 10, 11

Zavadil v. United States,
908 F.2d 334 (8th Cir. 1990) 3, 9

STATUTES CITED **PAGE**

33 U.S.C. § 702c 2, 3, 6, 7, 8, 10, 11, 12

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

♦

Petitioner, Daniel A. Boudreau, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. 1-13) is reported at 53 F.3d 81. The opinion of the District Court (App. 14-21) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 12, 1995. It subsequently denied Petitioner's timely petition for rehearing on June

13, 1995 (App. 22). This Court has jurisdiction to review this matter under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Flood Control Act of 1928, 33 U.S.C. § 702 provides in relevant part that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

STATEMENT OF THE CASE

The Petitioner brought this action in the Federal District Court for the Northern District of Texas, Dallas Division, pursuant to the Federal Tort Claims Act and, alternatively, under the Suits in Admiralty Act.

On July 5, 1992, the Petitioner and a companion were pleasure boating on Lake Lewisville, Texas, a flood control lake. After experiencing engine trouble, Petitioner called for help by radio to the Coast Guard Auxiliary and was told to anchor his vessel. A Coast Guard Auxiliary vessel subsequently arrived to assist Petitioner.

As instructed by the Auxiliary, Petitioner went to the front of his vessel to take up the anchor. Due to the acute and abnormal angle at which the Auxiliary vessel was pulling, the anchor line came out of the anchor tilt and almost severed Petitioner's left leg. The procedure employed by the Auxiliary for freeing the anchor was contrary to that published in its own training materials.

The District Court granted the United States' Motion to Dismiss for lack of jurisdiction. The Fifth Circuit affirmed over the dissent of Judge Jerry E. Smith.

REASONS FOR GRANTING THE WRIT

I. The Longstanding Split on Flood Control Immunity Continues to Become More Aggravated and Extreme.

This petition seeks much-needed edification on very important and repetitive questions which have never been directly addressed by the Court. Since this Court's decision in *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116 (1986), at least twenty-two reported personal injury cases have been decided under the flood control immunity statute, 33 U.S.C. § 702c. There also appear to have been a number of other cases which were not reported. A survey of certain of the reported cases reveals eight which involved divers who struck their heads on lake bottoms or submerged objects. These accidents were attributed, at least in part, to fluctuating water levels from the U.S. Army Corps of Engineers' release of flood waters.[1] Immunity was recognized in seven of those eight cases. Three other cases involved drownings attributed to misplaced markers or the absence of other warnings.[2] Immunity was granted in two and denied in the third. The third involved the drowning of a downstream fisherman by flood waters abruptly discharged to generate electricity.[3] Immunity was also denied in a case involving injury to a young girl who fell onto rocks from a swing on the shore of a flood control lake.[4]

As was the case three and one-half years ago when Justice Stevens issued his certiorari memorandum in *Hiersche v. United*

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[1] *McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1988); *Dewitt v. United States*, 878 F.2d 216 (8th Cir. 1989); *Fryman v. United States*, 901 F.2d 79 (7th Cir. 1990); *Zavadil v. United States*, 908 F.2d 334 (8th Cir. 1990); *Fisher v. United States, 31 F.3d 683* (8th Cir. 1994), *Bailey v. United States*, 35 F.3d 1118 (7th Cir. 1994), *Denham v. United States*, 646 F. Supp. 1021 (W.D. Tex. 1986), aff'd, 834 F.2d 518 (5th Cir. 1987); and *Swain v. United States*, 825 F. Supp. 966 (D.Kan. 1993).

[2] *Mocklin v. Orleans Levee District*, 877 F.2d 427 (5th Cir. 1989); *Dawson v. United States*, 894 F.2d 70 (3rd Cir. 1990); and *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989).

[3] *Henderson v. United States*, 965 F.2d 1488 (8th Cir. 1992).

[4] *Cox v. United States*, 827 F.Supp. 378 (N.D. W.Va. 1992).

States, 112 S.Ct. 1304 (Mar. 9, 1992), there continues to be an radical split among the circuits. Since 1992, the conflict has become much worse. The increase in the gap in the extreme outcomes has also increased the unfairness associated with national non-uniformity.

The dramatic effects of this incresed divergence in judicial thought can best be seen by a comparison of the Eighth Circuit's decision in ***Henderson v. United States***, 965 F.2d 1488 (8th Cir. 1992) and the Fifth Circuit's decision in Petitioner's case. Both were decided since this Court's consideration of *Hiersche*.

In *Henderson*, a downstream fisherman was swept away by water suddenly released to generate electricity. The Eighth Circuit considered whether flood waters were a substantial factor in causing the plaintiff's injuries. The waters were "flood waters" because the lake in question was created and operated for flood control purposes. However, the Court found that the release of waters was to create electricity, not for flood control. Hence, flood control was not a substantial factor in causing the injuries and immunity was not available. In summary, in the Eighth Circuit, even if flood waters cause the injury, there must be flood control activity involved.

On the other hand, the United States was immune in Petitioner's case where the injury was neither caused by flood waters nor was there a flood control activity involved. The unsoundness of the decision is further demonstrated by the fact that, if the Auxillary's conduct had been identical at any of the many non-flood control lakes, governmental immunity would have been out of the question.

The growing split among the circuits is genuine, substantial and beyond reason. It continues to grow, both in its harshness and in the pointlessness of the conflicting logic of the various circuits.

II. The Split in Judicial Reasoning Has Continued to Widen As Well

In addition to the growing divergence in results, there are also at least six different analytical approaches being used. Those are (i) the

Wholly Unrelated Test, (ii) the ***Ordinary Meaning Test***, ***(iii) the Nexus With Flood Control Test***, ***(iv) the Substantial Factor Test***, (v) the ***Increased Probability of Injury Test***, and (vi) the ***Other Operations Test***. Following is a brief but comprehensive survey of the great assortment of reasoning. While there are differences among all the various tests, the ***Wholly Unrelated Test*** (which was adopted by the Fifth Circuit in this case) stands absolutely alone and in stark contrast to all others.

A. The Wholly Unrelated Test

The ***Wholly Unrelated Test*** stands alone in its illogical and unjust consequences. In light of Petitioner's case, it now appears that the Fifth Circuit is also among its advocates. This doctrine began with ***Morici v. United States***, 681 F.2d 645 (9th Cir. 1982). That was a downstream landowner case seeking damage caused by excess seepage. The plaintiff argued that immunity should depend upon the particular purpose to which the project was being placed when the negligence occurred. Despite its acknowledgment of that proposition in ***Hayes***, 585 F.2d 701, the Ninth Circuit rejected the Fourth Circuit's position in ***Hayes*** and stated:

> Even if the project was being operated at the time of the negligence for a purpose other than flood control, the operation that caused the damage was not "wholly unrelated" to a Congressionally authorized flood control project. It is the relationship between the flooding and a project Congressionally authorized for flood control which is the controlling factor.

Morici, 681 F.2d 645, 648. ***Morici*** therefore concluded that it is the purpose of the project ***ab initio*** and not the purpose of the employees' conduct at the time of the injury, that is determinative. ***Morici***, 681 F.2d at 648. What this really means is that, regardless of the nature of the injury, how it occurred or what the cause, ***if it happened at a flood control lake, the United States is not responsible.***

Next in the line of Ninth Circuit "wholly unrelated" cases is

McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988), cert. denied 489 U.S. 1052 (1989). That was another swimmer case where a man struck his head on the bottom of the lake and fractured his neck. While the *McCarthy* court acknowledged the ongoing monitoring and discharge of flood waters to be a factor in the injury, it rejected the necessity for even that connection with flood control. Again, it adopted the holding and rationale of *Morici*, to-wit: ***if it happened at a flood control lake, despite the nature or cause of the injury, the United States is simply not liable.***

Citing *Morici*, the *McCarthy* decision stated said that "even if the project was being operated at the time of the negligence for a purpose other than flood control, so long as the damage or injury was not 'wholly unrelated' to a Congressionally authorized flood control project, a sufficient nexus for purposes of § 702c immunity exist". *McCarthy*, 850 F.2d at 563.

While the Fifth Circuit did not expressly declare its adoption of the ***Wholly Unrelated Test*** in this case, it is the only existing theory by which immunity could be granted on those facts. The injury happened to a recreational plaintiff and was caused by a governmental agency responsible only for recreational operations. The injury also occurred during the process of a purely recreational function. As a result, immunity can exist only if the test is ***"did it happen at a flood control lake?"***

B. The Ordinary Meaning Test

Both *James*, 478 U.S. 597 (1986) and the Fifth Circuit's earlier decision in *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) adopt the "ordinary meaning approach". The core statutory terms "flood" and "flood waters" were defined in *James*. They were held to have the ordinary meaning of including all waters contained in or carried through federal flood control projects for purposes of or relating to flood control, as well as to excess waters that the projects cannot control.

James held that the United States was immune from liability

because the damage at hand was caused "by flood or flood waters" and, therefore, the immunity provision applied. This Court noted, however, that if a plaintiff could prove damage as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he could avoid the absolute bar of § 702c,[5] citing in support *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978). *Accord, Graci v. United States*, 456 F.2d 20 (5th Cir. 1971).

James advocated a common sense and ordinary meaning approach to determine whether flood water caused the injury. If so, the question should become whether the acts of negligence were a part of flood control operations.

The proper application of *James* occured in *Mocklin v. Orleans Levee District*, 877 F.2d 427 (5th Cir. 1989) which correctly emphasized the ordinary meaning of "from or by" "flood water". That case involved a drowning victim. That drowning involved a child stepping off into a sharply dredged channel within Lake Pontchartrain. It had been dredged to give barges access to the shore to deliver levee repair materials and equipment. An "ordinary meaning" analysis applied to those facts resulted in a finding of immunity. The waters caused the death and the sharply dredged drop off was directly associated with the flood control aspects of levee maintenance.

C. The Nexus With Flood Control Test

Several cases utilize a "nexus" test of connection with flood control. When the function in question <u>does not have</u> a sufficient nexus with flood control, <u>immunity is denied</u>. The lead case here is *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989). It involved a swimmer who was snorkeling when he was struck by a boat and killed. Suit was brought alleging negligent failure to warn, or, in the

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[5] "If the Plaintiff could prove damage ... as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of 702c." *James*, 478 U.S. at 605 n.7.

alternative, to prohibit boats from being in the area. The Tenth Circuit found that Congress' concern was to protect the United States in connection with flood control operations and not operations associated with recreational activities, *Id at* 900. In order to establish immunity, the Court held that some necessary connection or link to flood control must exist. Finding none, immunity was denied. ***Holt v. United States***, 46 F.3d 1000 (10th Cir. 1995), is a new case where the Tenth Circuit applied the same test to different facts and granted immunity. In that case, released flood waters which became frozen and caused an ice slick on a road had a sufficient nexus with flood control.

Although invited to do so, the ***Boyd*** court refused to adopt the standard of ***McCarthy*** and the Ninth Circuit. See discussion ***supra***. That rationale would grant immunity when the injury would not have happened "but for" the creation of the flood control project to begin with, and without regard to flood related forces of causation or waters being the instrumentality of the injury. ***Boyd***, 881 F.2d at 900.

The last of the "nexus" cases is ***Cox v. United States***, 827 F.Supp. 378 (N.D. W.Va. 1992). That Court relied on ***Boyd*** and ***Fryman***, discussed ***infra***. ***Cox*** interprets those cases to hold that immunity under § 702c requires a certain nexus to the flood waters. ***Cox*** involved a fourteen-year-old girl who fell from a tree rope swing over an area near the shoreline while she was attempting to swing out over the lake. She fell onto the rocks and never reached the water. The Court adopted the logic of ***Fryman*** and ***Boyd*** and found that for immunity to exist, ***there must be some nexus to the flood waters beyond mere fact that the occurrence took place at or near a flood control project.***

D. The Substantial Factor Test

Several Courts have applied a test which inquires into whether flood control was a "substantial factor" in the cause of the injury. The most recent is ***Henderson v. United States***, 965 F.2d 1488 (8th Cir. 1992), discussed ***supra***. Another case is ***Dawson v. United States***, 894 F.2d 70 (3rd Cir. 1990). This was a consolidated case involving the drowning of two swimmers at the same recreational area on a flood

control lake. Both alleged negligence by the Corps of Engineers in the construction and operation of the so-called Somerfield North Recreation Area. The Court again found the applicable standard to be whether the waters contained in the flood control project were a substantial factor in causing the injuries. *Id.* at 74. The daily variation in water depth due to flood control releases was found to be a substantial factor in causing the drownings and immunity applied.

Zavadil v. United States, 908 F.2d 334 (8th Cir. 1990) is another diver case. The plaintiff was rendered a quadriplegic when he struck a submerged concrete boat ramp while diving from a dock. The lake water was subject to regular monitoring and release for flood control purposes. That monitoring and release was found to be a substantial factor in causing the injuries. Accordingly, the United States was immune from liability. ***Accord, Dewitt v. United States***, 878 F.2d 216 (8th Cir. 1989).

The most recent of these cases is ***Swain v. United States***, 825 F.Supp 966 (D.Kan. 1993). There, the plaintiff was injured when he went down a water slide on the back of a houseboat. Upon entering the water his left leg struck a submerged tree or stump. The injury ultimately resulted in the amputation of that leg. The Court examined ***"whether there is a sufficient requisite nexus between flood control activities and the injuries sustained by the plaintiff."*** Because the presence of the stump was a natural result of the flooding of bottom land, flood control was found to be a substantial factor and the United States was immune.

E. The Increased Probability of Injury Test

Fryman v. United States, 901 F.2d 79 (7th Cir. 1990) applied a test of "increased probability of injury". This was a swimmer case involving one who was injured near an island in a flood control lake. The island was submerged when the water level was high, but appeared when the water level was lower. During a period of lower water levels, Fryman attempted a shallow racing dive and hit a concealed hazard. This broke his neck and rendered him a quadriplegic. ***The Court used a causation test of whether flood control activities (as opposed to the***

mere existence of the project itself) increased the probability of the injury in question. ***Id.*** at 82. The Court held that flood control activities, including the constantly changing shoreline, did increase the probability of the plaintiff's injuries. Therefore, immunity was recognized.

Bailey v. United States, 35 F.3d 1118 (7th Cir. 1994), is another recent case where the Court has indicated that it would grant immunity where an injury was "more likely" because of the "activities or characteristics" of a flood control project.

F. The Other Operations Test

Several cases have focused their analysis, at least in part, on the role of non-flood control operations. In ***Henderson v. United States***, 965 F.2d 1488 (8th Cir. 1992), discussed ***supra***, the Court found that the activity involved was generating electricity, not flood control. Hence, immunity was denied.

Hayes v. United States, 585 F.2d 701 (4th Cir. 1978) was a case cited by this Court with approval in ***James*** for the proposition that proving that one's damages resulted from recreational operations, without relation to flood control, would bar § 702c immunity. ***James***, 478 U.S. at 605 n. 7. Hayes involved flooded downstream farmland. The Court recognized the possibility that the discharge of water, while primarily associated with flood control, could likewise be in the promotion of recreational uses. Accordingly, it held that if the plaintiff could prove that his damages were the result of the operation of the dam as a recreational facility without relation to its operation as a flood control facility, he would avoid the absolute bar of § 702c.

Denham v. United States, 646 F. Supp. 1021 (W.D. Tex. 1986), aff'd, 834 F.2d 518 (5th Cir. 1987), is another case where the Court focused on an alternative operation. Denham was seriously injured when he dove from knee deep water into waist deep water and struck his head on an abandoned concrete anchor. The Court found the acts of negligence were not part of the management of the flood control project, but instead part of the operation of the dam as a recreational

facility. The Court then found that the injuries were proximately caused by the operation of the dam as a recreational facility. Again, the Court denied immunity in reliance on the following language from *James*:

> **If the Plaintiff could prove damage ... as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c.[6]**

Another case from within the Fifth Circuit was *Respess v. United States*, 586 F.Supp. 861 (E.D. La. 1984). There, passengers in a pleasure boat were injured when their boat collided with a tree branch hanging over a canal. The Court denied immunity and held that the damage was caused by a failure to clear a waterway of a navigational hazard, not by flood waters.

III. The Decision of the Court of Appeals Perpetuates Error.

The Fifth Circuit in simply in error in this case and has failed to apply this Court's "*Ordinary Meaning Test*" announced in *James*. The dissent of Judge Smith below strikes at the heart of the matter when he correctly applied that test and stated that:

> **Immunity under § 702c simply does not apply, because there is no reasonable construction of the plain language of this provision by which the damage in this case was "from or by" flood waters.**

53 F.3d at 86.

Petitioner intends to argue to this Court that it should continue the *Ordinary Meaning Test* of *James*. This statute should be given its plain meaning *and nothing more*. The words "damage . . from or by

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[6] *James*, 478 U.S. at 605 n.7.

flood waters" ***should not be expanded*** to mean "damage . . from or by recreation related negligence."

IV. The Issue Is Important.

The conflict among the circuits continues to create harsh and unjust results by denying compensation to plaintiffs and survivors in select areas of the country and allowing recovery in others. It is arbitrary and capricious to allow Federal Tort Claims on non-flood control lakes, when the identical negligence would absolved by 33 U.S.C. § 702c when occurring on a flood control lake.

The disparity between the opposing views has only grown more acute in the three and one-half years since *Hiersche*. The continuation of unequal treatment throughout the country is unjust and promotes distrust, both of the legal system and the United States generally. The issue raised by this case is extremely important in many respects to many people and the controversy is more ripe for review than ever. It is therefore compelling that this Court resolve this conflict now.

CONCLUSION

For the foregoing reasons, this petition for a the issuance of a writ of certiorari should be granted.

Respectfully submitted,

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App. 1

Daniel A. BOUDREAU,
Plaintiff-Appellant,
v.
UNITED STATES of America,
Defendant-Appellee.
No. 94-10636.

United States Court of Appeals,
Fifth Circuit.

May 12, 1995.

Injured boat owner brought action against United States to recover for alleged negligence of Coast Guard Auxiliary in attempting to tow owner's stranded boat on flood control lake. The United States District Court for the Northern District of Texas, Jerry Buchmeyer, Chief Judge, dismissed based on immunity under Flood Control Act. Owner appealed. The Court of Appeals, Rhesa Hawkins Barksdale, Circuit Judge, held that Flood Control Act immunized United States from liability for alleged negligence of Auxiliary. Affirmed.

Jerry E. Smith, Circuit Judge, dissented and filed opinion.

1. Federal Courts k776

Dismissal for lack of subject matter jurisdiction is reviewed de novo. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

2. Federal Courts k34

Plaintiff has burden of demonstrating subject matter jurisdiction.

3. United States k78(9)

Flood Control Act provided United States with immunity from liability for alleged negligence of Coast Guard Auxiliary in attempting

to tow stranded recreational vessel on flood control lake on which boat owner was injured when anchor line broke free and swung into his leg; Army Corps of Engineers reached agreement with Auxiliary to perform function of providing water safety patrols, responsibility arose because of establishment of flood control project, and government's activity was part of "management of a flood control project" and was associated with flood control. 16 U.S.C.A. s 460d; 33 U.S.C.A. s 702c; 36 C.F.R. s 327.1(a).

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Northern District of Texas.

Before SMITH and BARKSDALE, Circuit Judges, and FITZWATER,[1] District Judge.

RHESA HAWKINS BARKSDALE, Circuit Judge:

At issue is whether the Flood Control Act of 1928, 33 U.S.C. s 702c ("No liability ... [to] United States for any damages from ... flood waters...."), provides immunity for the United States from the alleged negligence of the Coast Guard Auxiliary in attempting to tow a stranded recreational vessel on a flood control lake. Finding that this activity was "associated with flood control", *United States v. James*, 478 U.S. 597, 608, 106 S.Ct. 3116, 3122, 92 L.Ed.2d 483 (1986), we AFFIRM.

I.

On July 5, 1992, Daniel Boudreau and a friend took Boudreau's boat, the SHAMAN, out on Lake Lewisville, Texas. After experiencing engine trouble, Boudreau called for assistance from the Coast Guard Auxiliary, and was told to anchor his vessel. A Coast Guard Auxiliary vessel, the SIMPLE PLEASURE, arrived to assist, and its operator,

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[1] District Judge of the Northern District of Texas, sitting by designation.

Thomas Spalding, and his crew member gave verbal towing instructions to Boudreau.[2] After securing a tow line, Boudreau was instructed to either lift anchor or cut its line. While attempting to lift anchor, the anchor line broke free of its mount and swung into Boudreau's leg, causing severe injury.[3]

Upon Boudreau filing an action against the United States, the Government, *inter alia*, moved, pursuant to Fed.R.Civ.P. 12(b)(1), to dismiss for lack of subject matter jurisdiction, claiming immunity under s 702c of the Flood Control Act of 1928. The motion was granted.

II.

[1, 2] Boudreau asserts that, under the facts of this case, s 702c immunity does not lie. We review *de novo* a Rule 12(b)(1) dismissal, *e.g., EP Operating Ltd. Partnership v. Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir.1994), but with Boudreau having the burden of demonstrating jurisdiction. *Lowe v. Ingalls Shipbuilding, A Div. of Litton Sys., Inc.*, 723 F.2d 1173, 1177 (5th Cir.1984).

[3]Section 702c provides in relevant part: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place". Boudreau concedes that the Lake is a flood control lake. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988) (finding that Lake Lewisville is a flood control lake), *cert. denied*, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989). At issue, then, is whether his injuries were "from or by ... flood waters".

Guiding our decision is the general principle that "no action lies

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[2] Observing that winds were at least 30 knots, with waves of three to four feet, Spalding directed Boudreau and his friend to put on life jackets.

[3] The Government maintains that the anchor line broke free when the wind and waves hit the SIMPLE PLEASURE, causing it to turn sharply and pull the tow line. Boudreau denies that the conditions on the Lake contributed to the accident.

against the United States unless the legislature has authorized it". *Dalehite v. United States*, 346 U.S. 15, 30, 73 S.Ct. 956, 965, 97 L.Ed. 1427 (1953). Concomitantly, there must be a "clear relinquishment of sovereign immunity to give jurisdiction for tort actions". Id. at 31, 73 S.Ct. at 965. This principle is all the more in focus when, as here, a clear reaffirmation of immunity is in play.[4]

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[4] As discussed *infra*, the Supreme Court in *United States v. James*, 478 U.S. 597, 606-07, 106 S.Ct. 3116, 3121-22, 92 L.Ed.2d 483 (1986) (footnotes omitted; brackets by Court; emphasis added) took note of the reaffirmation of immunity by s 702c: ...

[W]e do not find that the legislative history of the statute justifies departure from the plain words of the statute. Indeed, on balance we think the legislative history of the Flood Control Act of 1928 reinforces the plain language of the immunity provision in s 702c.

The Flood Control Act enacted "a comprehensive ten-year program for the entire [Mississippi River] valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds." *United States v. Sponenbarger*, 308 U.S. 256, 262 [60 S.Ct. 225, 227, 84 L.Ed. 230] (1939). The Act was the Nation's response to the disastrous flood in the Mississippi River Valley in 1927. That flood resulted in the loss of nearly 200 lives and more than $200 million in property damage; almost 700,000 people were left homeless. S.Rep. No. 619, 70th Cong., 1st Sess., 12 (1928). The flood control system in the Mississippi River Valley in response to this catastrophe was the largest public works project undertaken up to that time in the United States.

It is not surprising, in the light of the devastation wrought by the 1927 flood and the magnitude of Congress' undertaking, that the legislative history of s 702c shows a consistent concern for limiting the Federal Government's financial liability to expenditures directly necessary for the construction and operation of the various projects. *Numerous statements concerning the immunity provision confirm that it was intended to reaffirm sovereign immunity in such a dangerous and extensive project.* The Chairman of the House Rules Committee, in opening the discussion on the rule governing debate on the 1928 Act, stated:

"I want this bill so drafted that it will contain all the safeguards necessary for the Federal Government. If we go down there and furnish protection to these people--and I assume it is a national responsibility--I do not want to have anything left out of the bill that would protect us now and for all time to come. I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years." 69 Cong.Rec. 6641(1928) (remarks of Rep. Snell).

A number of other Congressmen unequivocally stated that the United States should not be liable for any expense other than the direct cost of constructing the project. See *id.*, at 7028 (remarks of Rep. Spearing); *id.*, at 6999-7000 (remarks of Rep. Frear).

As our court has recognized, "[t]he Supreme Court has given [s 702c] broad meaning based on the language and legislative history of the section". *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427, 428-29 (5th Cir.1989) (citing *United States v. James*, 478 U.S. 597, 604, 106 S.Ct. 3116, 3120, 92 L.Ed.2d 483 (1986)). Indeed, the Court observed in *James* that "[i]t is difficult to imagine broader language", 478 U.S. at 604, 106 S.Ct. at 3121, and concluded that "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." *Id.* at 608, 106 S.Ct. at 3122.[5] The breadth of the Court's interpretation of s 702c is undeniable.[6]

Notwithstanding the broad language of *James*, there is disagreement among the circuits on the application of s 702c. *Hiersche v. United States*, 503 U.S. 923, 112 S.Ct. 1304, 117 L.Ed.2d 525 (1992) (Stevens, J.) (recognizing, but refusing to resolve circuit *84 split), *denying cert.* to 933 F.2d 1014 (9th Cir.1991). Three examples suffice.

The Ninth Circuit applies the "wholly unrelated" test; immunity is denied only when an injury is "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization". *Morici Corp. v. United States*, 681 F.2d 645, 647 (9th Cir.1982) (quoting *Peterson v. United States*, 367 F.2d 271, 275 (9th Cir.1966)); *see also*

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[5] In construing s 702c in *James*, the Court stated:

> The Act concerns flood control projects designed to carry flood waters. It is thus clear from s 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control. 478 U.S. at 605, 106 S.Ct. at 3121.

[6] As the Seventh Circuit observed: "The [Supreme] Court found it hard to conceive how s 702c could have been more broadly written; we find it hard to conceive how a decision interpreting this statute could have been more broadly written." *Fryman v. United States*, 901 F.2d 79, 81 (7th Cir.), *cert. denied*, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990).

McCarthy, 850 F.2d at 562.[7] On the other hand, the Tenth Circuit "cannot agree that Congress intended to stretch the shield of flood control immunity to the limits contemplated by the 'wholly unrelated' standard". *Boyd v. United States*, 881 F.2d 895, 900 (10th Cir.1989). The Seventh Circuit would at least grant immunity where an injury is "more likely" because of the "activities or characteristics" of a flood control project. *Bailey v. United States*, 35 F.3d 1118, 1124 (7th Cir.1994).[8]

In our circuit, the analysis is fact-specific. *See Mocklin*, 877 F.2d at 429-30 (applying fact-specific analysis; deciding only the case before it).[9] As hereinafter discussed, and based on the facts of this case, we conclude that, as per *James*, there is a sufficient association between the Coast Guard Auxiliary's activities and flood control.

James included " 'management' of a flood control project" within the ambit of activity associated with flood control. 478 U.S. at

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[7] In *McCarthy*, the Ninth Circuit upheld immunity after the plaintiff dove into shallow water at Lake Lewisville and fractured his neck. *McCarthy v. United States*, 850 F.2d 558, 563 (9th Cir.1988). The court reasoned that the creation of the flood control project at the Lake created a passive condition which led to the injuries; therefore, the injury was not "wholly unrelated" to flood control. *Id.* at 561-63. Likewise, the court concluded that the alleged negligence by the Government in failing to post warning signs for the benefit of recreational users of the lake was not "wholly unrelated" to flood control. *Id.* at 563.

[8] In *Fryman*, the Seventh Circuit had earlier explained that it would not rule out the possibility that immunity might apply even in cases where an injury was not made more likely by flood control activities, but only happened to occur at a flood control lake. Not required to reach that question, the court declined to do so. *Fryman*, 901 F.2d at 82; accord *Bailey v. United States*, 35 F.3d 1118, 1124 (7th Cir.1994).

[9] In *Mocklin*, plaintiffs' son drowned when he slipped from a sand bar into a flotation channel in Lake Pontchartrain. *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427, 428 (5th Cir.1989). The flotation channels had been dredged to provide access for barges carrying equipment for the reinforcement of the flood control levees along the lake. *Id.* Finding that the channels "were inescapably part of a flood control project", our court concluded that "the [flood control] water in the flotation channel causally did contribute to the drowning of the Mocklins' son: the channel created a significant drop-off in the lake". *Id.* at 430. Accordingly, a 702(c) immunity applied. *Id.*

609-10, 106 S.Ct. at 3123-24.[10] In turn, the district court based its decision to apply s 702c immunity in this case on the fact that the alleged negligence was by the Coast Guard Auxiliary, which "is part of the Government's management of Lake Lewisville and serves to control the waters in a variety of capacities". Relying on *James*, the district court concluded that the Auxiliary's management of the flood control lake established the requisite nexus between Boudreau's injury and flood control.

Boudreau challenges this conclusion, contending that the Auxiliary's responsibilities on the Lake consisted only of water safety management, and were therefore unrelated to flood control. His primary support comes from note 7 to the *James* opinion. That note contains a string-cite including *Hayes v. United States*, 585 F.2d 701, 702-03 (4th Cir.1978). *James*, 478 U.S. at 605 n. 7, 106 S.Ct. at 3121 n. 7. The parenthetical following the citation quotes a portion of *Hayes*, reading: "If the plaintiff could prove damage ... as a result of the dam's operation as a recreational facility *without relation to the operation of the dam as a flood control project*, he would avoid the absolute bar of s 702c." Id. (Emphasis added in *James*.)

Viewed in isolation, the Court's citation to *Hayes* appears to support Boudreau; but, on *85 close examination, it does not. First, the note is only in reference to the Court's statement in the text that "the waters [in issue] clearly fall within the ambit of the statute"; that statement did not concern when immunity would not bar liability for injury from flood waters. Id. at 605, 106 S.Ct. at 3121. Second, note 7 is internally inconsistent. In the same note, and *before* the citation to *Hayes*, the Court also cites *Morici*, 681 F.2d 645 at 647-48, for the proposition that immunity is available unless the Government's activity is "wholly unrelated" to flood control. *James*, 478 U.S. at 605 n. 7, 106 S.Ct. at 3121 n. 7. And, *Morici specifically rejected* the *Hayes*

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[10] The *James* Court stated that "the manner in which to convey warnings, *including the negligent failure to do so*, is part of 'management' of a flood control project". 478 U.S. at 610, 106 S.Ct. at 3124 (emphasis added).

approach. *Morici*, 681 F.2d at 647-48.[11]

Furthermore, as quoted in note 10, *supra*, the Court concluded in *James* that even the Government's *failure to warn* recreational visitors of dangerous conditions fell within "the 'management' of a flood control project". 478 U.S. at 610, 106 S.Ct. at 3123-24. Such management is involved here.[12] The creation of the flood control project resulted in the Army Corps of Engineers being responsible for providing water safety patrols at the Lake.[13] The Corps of Engineers, in turn, reached an agreement with the Coast Guard Auxiliary to perform this function.[14] Therefore, just as, under the facts in *James*, the Government had the responsibility to warn of dangerous water

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[11] In view of this inconsistency, the Seventh Circuit concluded: "We make nothing of the Court's citation to *Hayes*.... [C]iting inconsistent holdings does not endorse either." *Fryman*, 901 F.2d at 81. *See Zavadil v. United States*, 908 F.2d 334, 336 n. 4 (8th Cir.1990), *cert. denied*, 498 U.S. 1108, 111 S.Ct. 1017, 112 L.Ed.2d 1099 (1991); *Dawson v. United States*, 894 F.2d 70, 73 (3d Cir.1990); *McCarthy*, 850 F.2d at 562; *Cox v. United States*, 827 F.Supp. 378, 381 (N.D.W.Va.1992).

[12] Many of the s 702c cases involve accidents occurring at or near hydroelectric dams at flood control projects. *See, e.g., James*, 478 U. S. at 599-601, 106 S.Ct. at 3118-20 (accidents at flood dams in Arkansas and Louisiana). We note with interest that, when the Auxiliary was dispatched to find Boudreau's boat, it was reported located "out by the dam".

[13] The Flood Control Act of 1962 authorized the Corps of Engineers to "construct, maintain, and operate public park and recreational facilities" at flood control projects. 16 U.S.C. s 460d. Thus, upon the creation of a flood control project: "It is the policy of the Secretary of the Army, acting through the Chief of Engineers, to manage the natural, cultural and developed resources of each project in the public interest, providing the public with safe and healthful recreational opportunities...." 36 C.F.R. s 327.1(a).

[14] The Memorandum of Agreement between the Corps of Engineers and Coast Guard reads in part:

1. Responsibility[.] A. Both the U.S. Army Corps of Engineers and the U.S. Coast Guard are responsible for administering water safety programs on inland lakes under their concurrent jurisdictions....
2. Purpose of Agreement. A. Recognizing the above responsibilities, it is hereby granted that the purpose of this agreement is to facilitate water safety patrols by local U.S. Coast Guard Auxiliary....

conditions, the Government had the responsibility under the facts in this case to provide water safety patrols. In each instance, the responsibility arose because of the establishment of a flood control project. Likewise, in each instance, the Government's activity is properly considered part of the "management of a flood control project".

Notwithstanding that the Auxiliary was engaged in the management of a flood control project, Boudreau contends, as noted, that his injury is completely unrelated to flood control. Although we disagree, we note the suggestion by some courts that "management of a flood control project" may well be insufficient, standing alone, to allow for s 702c immunity. As the Seventh Circuit observed:

> The "management of a flood control project" includes building roads to reach the beaches and hiring staff to run the project. If the Corps of Engineers should allow a walrus-sized pothole to swallow tourists' cars on the way to the beach, or if a tree trimmer's car should careen through some picnickers, these injuries would be "associated with" flood control.... Yet they would have nothing to do with management of flood waters, and it is hard to conceive that they are "damage from or by floods or flood waters" within the scope of s 702c.

Fryman v. United States, 901 F.2d 79, 81 (7th Cir.), *cert. denied*, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990); Cox, 827 *86 F.Supp. at 381-82. We leave for another day whether this should influence future decisions by this court. In any event, if the foregoing represents an over-application of s 702c, the present case is safely removed from that realm. Here, we cannot say that Boudreau's injury has "nothing to do with management of flood waters". His injury resulted from a *boating* accident *on flood control waters* involving the *Government's patrol of those waters*. Assuming, without deciding, that something more is required in addition to "management of a flood control project", we are confident that, based on the facts at hand, this

case meets the mark.[15]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

"[A]s with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979). The relevant statutory provision for this case states:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

33 U.S.C. s 702c.

The Supreme Court acknowledged, and the majority emphasizes, the broad nature of this language. *See United States v. James*, 478 U.S. 597, 604, 106 S.Ct. 3116, 3120-21, 92 L.Ed.2d 483 (1986). Specifically, the Court has emphasized the word "any," which appears three times in the relevant provision. *Id.* This case, however,

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[15] The Government notes that, but for the creation of the flood control project at the Lake, Boudreau could not have been injured there. It notes also that a boating accident such as this could occur only on water. But we need not stop there. Although causation is disputed, the conditions on the Lake and the location of Boudreau's vessel certainly made an accident of this nature more probable. For example, not only did the accident occur at a flood control lake, it occurred in an area that would not have been submerged without flood control. In this regard, the Government maintains that Boudreau's anchor was caught in trees beneath the surface of the lake--trees submerged only as the result of flood control. Furthermore, it is evident from the record that the waves, high winds, and other conditions on the lake *could* have contributed to the accident.

does not turn on language from the relevant provision that is modified by the word "any."

The simple question is whether the damages in this case were "from or by floods or flood waters." I will assume that the circumstances in this case involved "floods or flood waters" within the meaning of the statute, though this might be disputed. *See James*, 478 U.S. at 605 and n. 7, 106 S.Ct. at 3121 n. 7; *Denham v. United States*, 646 F.Supp. 1021, 1026-27 (W.D.Tex.1986) (holding that injury sustained from flood control project's use as a recreational facility was not subject to immunity provision of s 702c), *aff'd*, 834 F.2d 518 (5th Cir.1987).[1] Immunity under s 702c simply does not apply, because there is no reasonable construction of the plain language of this provision by which the damage in this case was "from or by" flood waters.

It is undisputed that the injury resulted from a Coast Guard rescue attempt at Lake Lewisville. Water had nothing to do with the injury, except that *but for* the very existence of the water, the injury would not have occurred. This type of connection, however, is too tenuous to be supported by a rational construction of "from or by."

The majority admits as much by holding that the relevant nexus is between the injury and "flood control," not flood waters. The majority rejects the suggestion that its holding is overly broad, *i.e.*, that a broad reading conceivably could extend governmental immunity to traffic mishaps or tree-trimming mistakes related to the "management of a flood control project." *See Fryman v. United States*, 901 F.2d 79, 81 (7th Cir.), *cert. denied*, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990). Instead, the majority claims that "the present case is safely removed from that realm. Here, we cannot say that Boudreaus's injury has 'nothing to do with management of flood waters.' "

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[1] I realize that this point may be part and parcel of the causation analysis or vice versa. *See Denham*, 646 F.Supp. at 1026. I concentrate on the causation point specifically, for emphasis.

The word "management" appears nowhere in the relevant provision of s 702c, however. It is gleaned from the following passage in *James:*

> [Plaintiffs] also argue, in the alternative, that even if 702c is intended to grant immunity in connection with flood control projects, the Federal Government is not entitled to immunity here because their injuries arose from Government employees' alleged mismanagement of recreational activities wholly unrelated to flood control. In support of this argument they point to a "fundamental principle of immunity" that the "sphere or protected activity must be narrowly limited by the purpose for which the immunity was granted." *We think, however, that the manner in which to convey warnings, including the negligent failure to do so, is part of the "management" of a flood control project.* And as noted in n. 7, supra, the Court of Appeals found that the release of waters at the [accident sites] was clearly related to flood control.

Id. at 609-10, 106 S.Ct. at 3123-24 (emphasis added). Neither this passage nor the facts of *James* support the conclusion that a nexus between the damage and flooding has been jettisoned.

The litigation in *James* was the result of the consolidation of two separate accident cases. In both cases the accidents occurred in the reservoirs of federal flood control projects. In both, recreational users were swept through retaining structures and either drowned or injured when the structures were opened to release water to control flooding. Id. at 599-602, 106 S.Ct. at 3118-20. There is no doubt that the injuries were caused by flood waters.[2]

Despite its denial, under the majority's reading of the "management" language from *James*, a negligent failure to warn a motorist of a road hazard, resulting in an accident within the confines

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[2] As the majority indicates, the accident in this circuit's case, Mocklin v. Orleans Levee Dist., 877 F.2d 427 (5th Cir.1989), was the drowning of the son of the plaintiffs.

of a recreational area that is part of a flood control project, would give rise to immunity under the Flood Control Act, because such a "failure to do so [ ] is part of the 'management' of a flood control project."

This passage from *James* must be construed in light of the facts of *James* and the plain language of s 702c. The predicate of the Court's language was injuries plainly caused by flood waters. This threshold is simply not met in the instant case. As indicated above, the Supreme Court acknowledged that the language of s 702c is broad; it did not indicate, however, that the provision should be read as "any damage related to the management of a federal flood control project." Accordingly, because the alleged damages in this case were not caused by flooding, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DANIEL A. BOUDREAU,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CASE NO. 3-93-CV-1263-R
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendants.	§	

MEMORANDUM OF OPINION AND ORDER

Now before this court is the Motion to Dismiss pursuant to Rule 12(b) (I) of the Federal Rules of Civil Procedure and/or for Summary Judgment of the Defendant, the United States of America and the Motion for Summary Judgment of the Plaintiff, Daniel A. Boudreau pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons discussed below, this Court is of the opinion that the Defendant's Motion to Dismiss should be **GRANTED.**

Background

This case arises from incidents occurring during a boat towing accident on Lake Lewisville on July 5, 1992. Pursuant to the Public Vessels Act, 46 U.S.C. §§ 781-789 and the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, Boudreau ("Plaintiff",) filed a complaint against the United States of America ("Defendant") alleging that he was injured as a result of the negligent acts of the United States, the United States Coast Guard, and the United States Coast Guard Auxiliary. Specifically, Plaintiff's complaint alleges the following: On July 5, 1992 Plaintiff was boating at Lake Lewisville, Texas on board the SHAMAN, a 24 foot 1966 Thunderbird Trihull. At about 2:00 or 2:30 PM, the SHAMAN experienced engine troubles and would not run.

Plaintiff called the Coast Guard Auxiliary on Channel 16 VHF and was told to put down anchor. At approximately 5:00 PM, the Coast Guard Auxiliary arrived on board the 34 foot twin screw Sea Ray Express Cruiser SIMPLE PLEASURE. SIMPLE PLEASURE was piloted by Tom Spaulding, a qualified Coast Guard Auxiliary vessel operator.

On July 5, 1992, weather warnings were broadcast warning of severe wind conditions on the lake. The winds were 15-20 knots and gusting to 25-30 knots from the South, with waves two to three feet.[3] [4] Plaintiff denies knowledge of any such broadcasts.

At the commencement of the towing operation, SHAMAN was held fast by her anchor. SIMPLE PLEASURE circled SHAMAN while the Auxiliary crew directed the SHAMAN's crew to put on their life jackets. After a successful parallel approach (required by the windy conditions), SIMPLE PLEASURE was able to pass a tow line to SHAMAN. During the transfer, Plaintiff initially attempted to secure the line over the bow railing. After additional instructions from Shelia Campbell of SIMPLE PLEASURE, Plaintiff tied off the rope on a starboard side, forward cleat beneath the railing. Ms. Campbell directed Plaintiff to either retrieve his anchor or cut it loose. Plaintiff chose the former. Defendant alleges that the anchor was fouled; Plaintiff denies this. In either event, Plaintiff alleges that the SIMPLE PLEASURE was pulling SHAMAN hard to starboard and continued to do so in spite of Plaintiff's yelling for SIMPLE PLEASURE to back off. Subsequently, Plaintiff alleges the anchor line came out of the tilt causing injuries to Plaintiff's leg. Defendant's version of the facts differ in that SIMPLE PLEASURE is not pulling SHAMAN, but avoiding getting fouled on SHAMAN's anchor line. Further, Defendant alleges that Plaintiff placed his foot on the slackened tow line and that line causes the injury to Plaintiff's leg. Both parties also disagree as to the severity of the

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[3] See Report of E.A. Davenport, IPDCP, Division V, of the United States Coast Guard Auxiliary, dated July 14, 1992.

[4] See Defendant's Response to Plaintiff's Motion for Partial Summary Judgment at Attachment Four at page 41.

weather effect on both vessels at the scene.

Defendant's Motion to Dismiss

The United States of America puts forth two arguments in support of its Motion to Dismiss. First, Defendant argues that Plaintiff's claims are barred by the immunity provision of the Flood Control Act, 33 U.S.C. • 702c. Second, Plaintiff's claims are barred by application of the Federal Tort Claims Act, 28 U.S.C. °° 2761 et sea. Accordingly, should either argument be valid, Defendant seeks a dismissal. The Court addresses each argument in turn.

Analysis

I. Defendant's Argument One: Plaintiff's Claim is Barred by the Immunity Provision of the Flood Control Act, 33 U.S.C. 4 702c[5]

In his attempt to overcome the bar to liability provided by the Flood Control Act, Plaintiff relies largely on attempts to distinguish United States v. James[6] and specific language from Hayes v. United States[7] and Denham v. United States.[8] James held that the government was immune from liability even though respondent was injured through negligent management of a flood control project. The James holding is specific against suits such as Plaintiff's in that it recognizes the broad immunity language of the Flood Control Act.

In Hayes, that plaintiff was able to avoid the bar because the damages caused by the government's operation of a dam were not

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[5] 33 U.S.C.A. • 702c reads in relevant part: No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

[6] United States v. James, 478 U.S. 597 (1986).

[7] Hayes v. United States, 585 F.2d 701 (4th Cir. 1978).

[8] Denham v. United States, 646 F. Supp. 1021 (W.D. Tex.1986).

related to flood control per se, but instead were a function of the dam's use as a recreational facility.[9] [10] Hayes dealt with the downstream effects of a dam's release of flood waters. Hayes preceded the Supreme Court's decision in James and was a limited holding that addressed the premature granting of a motion to dismiss. Further, Hayes did not address personal injury liability and was a more traditional ° 702c case dealing with the effects of the flood waters themselves.

In Denham, the Western District of Texas and 5th Circuit held that a plaintiff could sue the government because of negligence in the operation of a dam as a recreation facility. Denham involved the negligent maintenance of a swimming area on Lake Lewisville in which the plaintiff was injured on ubmerged concrete blocks. In avoiding the bar of ° 702c, the Denham Court introduced the following test to determine if James precludes recovery:

> 1) whether the alleged acts of negligence by the Government are part of the "management" of the flood control project,
> 2) whether (Plaintiff's) injuries were proximately caused by the operation of the dam as a flood control project[11]

An affirmative answer to either test successfully bars recovery. The Denham court held that the blocks were neither part of the management

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[9] Hayes v. United States, 585 F.2d at 703.

[10] Both parties focus their attention on the language of James, 478 U.S. 597, 605 at n.7. which quotes Hayes and reads in part: "If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he could avoid the absolute bar of ° 702c." (emphasis in the original) The Plaintiff attempts to distinguish the James decision here because it does not deal with damage done by the water of Lake Lewisville itself (i.e. release of water). See Plaintiff's Response to Defendant's Cross-Motion at 3-4. This view ignores what would be the fundamental question of fact addressing this Court: was the management of the flood control facility negligent? Such an inquiry is, however, premature.

[11] Denham v. United States, 646 F. Supp. 1021, 1026 (W.D. Tex.1986), aff'd, 834 F.2d 518 (5th Cir. 1987).

of the flood control project nor were the plaintiff's injuries derivative of the operation of the dam.

We find that Plaintiff's injuries are the result of the Government's management of the project. The district court in Denham concluded that:

> "(t)he cause of plaintiff s injury should be reviewed on a case by case basis to determine the relationship of the injury to the control, retention, and/or release of flood waters." (emphasis added)[12]

While this issue was not appealed to the 5th Circuit, we find this language to be controlling in this case. The Coast Guard Auxiliary is part of the Government's management of Lake Lewisville and serves to control the waters in a variety of capacities. The Auxiliary performs voluntary water safety patrols on Lake Lewisville in addition to the water safety programs of both the U.S. Army's Corps of Engineers and the U.S. Coast Guard.[13] This active presence distinguishes the instant case from Denham.

As the basis for Defendant's claim of sovereign immunity under 33 U.S.C. ° 702c, the United States cites United States v. James,[14] McCarthy v. United States[15] and Morici Corp. v. United States.[16] James deals with two separate cases arising in Arkansas and Louisiana where recreational users of federal flood control projects were injured (or drowned) and alleged negligence. Further, both cases were brought

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[12] Denham v. United States, 646 P. Supp. at 1027.

[13] See Defendant's Response at Attachment 6, Enclosure 2.

[14] United States v. James, 478 U.S. 597 (1986).

[15] McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988),cert. denied, 489 U.S. 1052 (1989).

[16] Morici Corp. v. United States, 681 F.2d 645 (9th Cir.1988).

under the Federal Tort Claims Act. The Supreme Court held that "any damage" and "liability of any kind" language of the statute is clear and accordingly provides the government with immunity.[17]

McCarthy, like Denham, is another Lake Lewisville case with another diver who is paralyzed by diving in shallow water. Unlike Denham, McCarthy's plaintiff, who suffers similar injuries in the same body of water, recovers nothing due to the bar of ° 702c. The 9th Circuit's opinion in McCarthy, while not controlling, is true to the Supreme Court's holding in James that Governmental immunity to liability stems from the Flood Control Act. The McCarthy court did not adopt the Hayes approach for limiting the breadth of ° 702c. Such a rejection is justified given the Supreme Court's analysis of the legislative intent behind the FCA in James[18] and that the Hayes facts are so clearly distinguishable. Due to its recency, McCarthy's holding that, "(s)o long as a project is authorized by Congress for flood control purposes, and the damage or injury is related to the use of that project, immunity continues to attach"[19] reflects a review of many cases cited by both parties.[20]

Such a view is also consistent with the long standing principles of sovereign immunity. Commenting specifically on ° 702c claims, the James court held that "the broad principle applicable here is that a `clear relinquishment of sovereign immunity (is required) to give justification for tort actions."[21] ° 702c does not make such a relinquishment. On the

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[17] United States v. James, 478 U.S. at 604.

[18] See United States v. James, 478 U.S. at 607-609.

[19] McCarthy v. United States, 850 F.2d at 562.

[20] This list includes: United States v. James, 478 U.S. 597-(1986); Denham v. United States, 646 F. Supp. 1021 (W.D. Tex.1986), aff'd 834 F.2d 518 (5th Cir. 1987); Grace v. United Staidest F.2d 20 (5th Cir. 1971); Morici Corp. v. United States, 681 F.2d 645 (9th Cir. 1982); Hayes v. United States 585 F.2d 701 (4thCir. 1978).

[21] United States v. James, 478 U.S. at 610, citing Dalehite v. United States, 346 U.S. 15, 31 (1953).

contrary, the Supreme Court held that the plain language of the statute[22] precludes suits similar to the instant case.

Morici, another 9th Circuit opinion, is instructive in two ways, but is not controlling here. First, that court held that multi-use facilities (such as Lake Lewisville) enjoy immunity if one of their authorized uses is specifically flood control.[23] Second, the negligence of the employees (such as the Coast Guard Auxiliary in the -instant case) is not the determinative factor. Instead, Morici holds that the purpose of the project authorized by Congress should be the focus of our attention.[24] While the analysis is appealing, it is not the law of this Circuit.

The Supreme Court's holding in United States v. James clearly precludes a finding of liability against the government in spite of alleged negligence by the government in managing a flood control project in its use as a recreational facility.

II. Defendant's Argument Two: Plaintiff's Claims Are Barred By Application of the Federal Tort Claims Act, 28 U.S.C. §§ 2761 et seq.

Because the Court finds the Defendant's Motion to Dismiss to be compelling, the -Court need not re&ch the Defendant's or Plaintiff's cross-motions for Summary Judgment. Accordingly, we give no opinion on the validity of these claims.

Conclusion

Based on the foregoing, and after careful consideration, it is **ORDERED** that Defendant's Motion to Dismiss be and is hereby

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[22] See Footnote 3, supra.

[23] Morici Corp. v. United States, 681 F.2d 645, 647 (1982).

[24] Morici Corp. v. United States, 681 F.2d at 648.

GRANTED.

SIGNED THIS 27 DAY OF JUNE, 1994.

/S/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10636

DANIEL A. BOUDREAU,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the united States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(June 13, 1995)

Before SMITH and BARKSDALE, Circuit Judges, and FITZWATER, *District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is **DENIED.**

ENTERED FOR THE COURT:

/S/ RHESA HAWKINS BARKSDALE
United States Circuit Judge

*District Judge of the Northern District of Texas, sitting by designation.

Supreme Court, U.S.
FILED
DEC 11 1995
OFFICE OF THE CLERK

No. 95-398

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL A. BOUDREAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's tort action for damages arising from personal injuries sustained as a result of the allegedly negligent towing by the Coast Guard Auxiliary of petitioner's disabled vessel on a federal flood control lake.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 35 F.3d 1118 (7th Cir. 1994). 8, 11

Boyd v. *United States*, 881 F.2d 895 (10th Cir. 1989) 7, 9, 10

Dawson v. *United States*, 894 F.2d 70 (3d Cir. 1990) 6, 7, 8

Dewitt Bank & Trust v. *United States*, 878 F.2d 246 (8th Cir. 1989), cert. denied, 494 U.S. 1016 (1990) 6, 8

Fisher v. *United States Army Corps of Engineers*, 31 F.3d 683 (8th Cir. 1994) 6, 7, 8-9

Fryman v. *United States*, 901 F.2d 79 (7th Cir.), cert. denied, 498 U.S. 920 (1990) 6, 7, 8, 10

Henderson v. *United States*, 965 F.2d 1488 (8th Cir. 1992) 6-7, 9

Hiersche v. *United States*, 933 F.2d 1014 (9th Cir. 1991), cert. denied, 503 U.S 923 (1992) 6, 8, 11

Holt v. *United States*, 46 F.3d 1000 (10th Cir. 1995) 6, 7-8, 10, 11

McCarthy v. *United States*, 850 F.2d 558 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989) 6, 7, 8

Mocklin v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) 6, 7, 8, 11

Reese v. *South Florida Water Management District*, 59 F.3d 1128 (11th Cir. 1995) 6, 8

Thomas v. *United States*, 959 F.2d 232 (4th Cir. 1992) 6

United States v. *James*, 478 U.S. 597 (1986) 3, 4, 5

Statutes and rule: Page

Zavadil v. *United States*, 908 F.2d 334 (8th Cir. 1990), cert. denied, 498 U.S. 1108 (1991) 6
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 2
Flood Control Act of 1928, 33 U.S.C. 702c ..... *passim*
Public Vessels Act, 46 U.S.C. 781 *et seq.* 2
Fed. R. Civ. P. 12(b)(1) 2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 53 F.3d 81. The opinion of the district court (Pet. App. 14-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. A petition for rehearing was denied on June 13, 1995. Pet. App. 22. The petition for a writ of certiorari was filed on September 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, Daniel Boudreau, was injured as his disabled vessel was being towed by a Coast Guard Auxiliary vessel on a federal flood control lake. He alleged that he was injured by the Coast Guard Auxiliary's negligence. The district court dismissed the complaint, holding that it was barred by the Flood Control Act of 1928, 33 U.S.C. 702c. Pet. App. 14-21. The court of appeals affirmed, with one judge dissenting. *Id.* at 1-13.

1. On July 5, 1992, petitioner experienced engine trouble while boating on Lake Lewisville, Texas, a federal flood control lake. Pet. App. 14. Petitioner called the Coast Guard Auxiliary by radio and was told to anchor the vessel. *Id.* at 15. The Coast Guard subsequently arrived, secured a tow line, and instructed petitioner to lift the anchor or cut the line. Petitioner attempted to lift the anchor, but it broke free and caused injury to petitioner's leg. *Id.* at 15-16.

2. Petitioner brought this negligence action against the United States pursuant to the Public Vessels Act, 46 U.S.C. 781 *et seq.*, and the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the Northern District of Texas. Pet. App. 14. The United States moved pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the complaint for lack of subject matter jurisdiction, arguing that the United States was immune under the Flood Control Act of 1928, 33 U.S.C. 702c. Section 702c provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *.

The district court granted the government's motion to dismiss. Pet. App. 14-21. The district court stated that, under *United States* v. *James*, 478 U.S. 597 (1986), the United States is immune from suit for injuries allegedly caused by the negligent management of a flood control project. Pet. App. 16. The district court concluded that, since petitioner alleged injuries in connection with the Coast Guard Auxiliary's management of Lake Lewisville, the United States was immune from the suit under *James*. *Id.* at 18-20.

3. The court of appeals affirmed. Based on a "fact-specific analysis" limited to the instant case, Pet. App. 6, the court found a "sufficient association between the Coast Guard Auxiliary's activities and flood control" for Section 702c to bar petitioner's suit. Pet. App. 6. The court noted this Court's "conclu[sion] in *James* that even the Government's *failure to warn* recreational visitors of dangerous conditions fell within 'the "management" of a flood control project.'" *Id.* at 8. The court concluded that "[s]uch management is involved here." *Ibid.* The court recognized the possibility that in some cases "'management of a flood control project' may well be insufficient, standing alone, to allow for [Section] 702c immunity," especially if the accident on which the claim is based occurs away from the water. Pet. App. 9. In this case, however, petitioner's injuries resulted "from a *boating* accident on *flood control waters* involving the *Government's patrol of those waters*," leading the court to find, "based on the facts at hand," a sufficient nexus between petitioner's injuries and flood control. *Ibid.*

ARGUMENT

When Congress embarked in 1928 upon a major program to construct dams and other structures for flood control, one of the issues it faced was the scope of the federal government's immunity from liability for damages resulting from its flood control activities. Congress limited the government's financial exposure by including in the 1928 legislation a provision that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c.

This Court considered the meaning of Section 702c in *United States* v. *James*, 478 U.S. 597 (1986). The two cases decided in *James* involved personal injuries to recreational users of an artificial lake constructed by the United States for purposes of flood control. In each case, currents created by the Army Corps of Engineers' release of waters from the lake pulled individuals into the dam's retaining structures. In one case, a string of buoys delineating the area of danger had broken and drifted away; in the other case, signs intended to warn recreational users about dangerous currents were not adequately visible. See *id.* at 600-602. The question presented in *James* was whether Section 702c "bars recovery where the Federal Government would otherwise be liable * * * for personal injury caused by the Federal Government's negligent failure to warn of the dangers from the release of floodwaters from federal flood control projects." 478 U.S. at 598-599.

A primary issue in *James* was whether Section 702c's immunity applies to suits for personal injury as well as to suits for property damage. The Court

held that the statutory immunity provision applies to both kinds of damage claims. 478 U.S. at 605. The Court noted, in this connection, that Section 702c "outlines immunity in sweeping terms," that "[i]t is difficult to imagine broader language," and that "Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction." 478 U.S. at 604-605. The Court noted that the statute's legislative history confirms "that the sweeping language of § 702c was no drafting inadvertence," and that "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." 478 U.S. at 608.

With respect to the scope of immunity from personal injury liability, the Court held that Section 702c covered the recreational accidents involved in the cases before it. The Court stated that the terms "floods" and "flood waters" "apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." 478 U.S. at 605. Because the waters in which the accidents occurred were contained in a federal flood control project, those waters "clearly [fell] within the ambit of the statute." *Ibid.* The Court rejected plaintiffs' argument that the government "is not entitled to immunity * * * because their injuries arose from Government employees' alleged mismanagement of recreational activities wholly unrelated to flood control." *Id.* at 609-610. It held that "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." *Id.* at 610.

The decision below is the latest in a series of cases since *James* in which the courts of appeals have applied Section 702c to personal injury claims involving federal flood control lakes. At least eleven cases have held that the government is immune from suit, while two cases have rejected the government's immunity defense. See *Reese* v. *South Florida Water Management District*, 59 F.3d 1128 (11th Cir. 1995) (holding government immune from claim involving recreational swimming accident at a federal flood control lake); *Holt* v. *United States*, 46 F.3d 1000, 1005 (10th Cir. 1995) (government immune from suit where mist from water released from dam created ice slick on adjacent road); *Fisher* v. *United States Army Corps of Engineers*, 31 F.3d 683 (8th Cir. 1994) (recreational diving accident); *Thomas* v. *United States*, 959 F.2d 232 (4th Cir. 1992) (recreational diving accident) (Table); *Zavadil* v. *United States*, 908 F.2d 334 (8th Cir. 1990) (recreational diving accident), cert. denied, 498 U.S. 1108 (1991); *Hiersche* v. *United States*, 933 F.2d 1014 (9th Cir. 1991) (accident involving professional diver inspecting dam's underwater fish screens) (Table), cert. denied, 503 U.S. 923 (1992); *Fryman* v. *United States*, 901 F.2d 79 (7th Cir.) (recreational diving accident), cert. denied, 498 U.S. 920 (1990); *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990) (recreational swimming accident); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246 (8th Cir. 1989) (diving accident), cert. denied, 494 U.S. 1016 (1990); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (swimming accident); *McCarthy* v. *United States*, 850 F.2d 558, 561 (9th Cir. 1988) (diving accident), cert. denied, 489 U.S. 1052 (1989). But see *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity from claim by

recreational wade fisherman); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity from claim by snorkeler struck by boat). In five of the cases in which immunity was upheld, this Court denied petitions for a writ of certiorari.

Every court since *James* that has addressed the application of Section 702c to personal injury claims has held that there must be some nexus between the injury giving rise to the claim and the government's management of flood waters to warrant Section 702c immunity. Petitioner states that the lower courts are "radical[ly] split" on the issue of how to determine whether a sufficient nexus exists and that the courts have adopted six distinct tests for that purpose. Pet. 4. Despite some semantic differences, however, there appear to be two basic approaches. On the one hand, the Third, Fifth and Ninth Circuits have held that Section 702c bars all claims arising from injuries at flood control projects unless the injuries are *wholly unrelated* to flood control. See, *e.g.*, *Dawson*, 894 F.2d at 73-74; *Mocklin*, 877 F.2d at 430 & n.6; *McCarthy*, 850 F.2d at 562-563. On the other hand, the Seventh, Eighth and Tenth Circuits have declined to adopt the "wholly unrelated" standard and have suggested that Section 702c requires a more substantial nexus between the injury and flood control activities than the "wholly unrelated" standard seems to require. See, *e.g.*, *Fryman*, 901 F.2d at 82 (questioning the "wholly unrelated" approach and suggesting that flood control activities must "increase the probability" of injury); *Fisher*, 31 F.3d at 684 (Section 702c immunity applies only if "governmental control of flood waters was a substantial factor" in causing the injuries); *Holt*, 46 F.3d at 1003-1004 (criticizing the "wholly unrelated"

test and adopting a fact-based inquiry into the "nexus" between flood control activities and the injury).

The two formulations are similar in that each requires examination of the factual nexus between the government's management of flood waters and the injury involved. The difference between the formulations is not always easy to discern. For example, the Third Circuit (a "wholly unrelated" jurisdiction) suggested in *Dawson* that an injury may be "wholly unrelated" to flood control if waters contained by the flood control project are not "a substantial factor in [causing] injuries." 894 F.2d at 74 (citing *McCarthy*, 850 F.2d at 561-562). See also *Bailey* v. *United States*, 35 F.3d 1118, 1121 (7th Cir. 1994) (noting that "in practice, the Eighth Circuit's 'substantial factor' analysis operates much like the 'wholly unrelated' inquiry as applied by the Third Circuit in *Dawson*.") And as a practical matter, the two approaches have produced similar results. Thus, the courts have generally held under either standard that Section 702c precludes government liability for swimming, diving, or boating accidents if the government's management of flood waters contributed to the injury. See, *e.g.*, *Reese*, 59 F.3d at 1129-1131 (release of waters from dam, for reasons partially related to flood control, created currents that contributed to accident); *Dawson*, 894 F.2d at 74 (same); *Hiersche* v. *United States*, 933 F.2d 1014 (9th Cir. 1991) (Table) (same); *Mocklin*, 877 F.2d at 430 (dredging at flood control project created sudden drop-off in lake floor which contributed to drowning); *Fryman*, 901 F.2d at 82 (fluctuation of water levels at flood control project contributed to diving hazard); *DeWitt*, 878 F.2d at 246 (same); *Fisher*, 31 F.3d at 684-685 (shallow water re-

sulting from operation of flood control project created diving hazard).

In the two cases in which the government's Section 702c immunity defense was rejected, the courts of appeals ruled that the government had failed to demonstrate an adequate nexus under the specific facts involved. In *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992), the court of appeals held that the United States was not immune from a wrongful death action after a fisherman drowned in water currents caused by release of water from a dam. Although the Army Corps of Engineers caused the water to be released, the court noted that the Corps was following the directions of a private power company that was operating the dam solely for purposes of generating electricity. 965 F.2d at 1492. The court could not conclude that "government control of flood waters was a substantial factor in causing" the alleged injuries, and thus held that the government could not invoke Section 702c as a defense. *Ibid.*

In *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989), the court of appeals held that Section 702c did not bar a suit for damages incurred when a snorkeler was struck and killed by a privately operated power boat at a flood control lake. The suit was based, *inter alia*, on the government's allegedly negligent failure to warn swimmers that boating was permitted in the area. The court of appeals stated that a sufficient nexus between the injury and flood control does not exist if the government can only show that "the injury would not have occurred but for the creation of a flood control lake." 881 F.2d at 900. The court expressly limited its holding to the facts of the case before it: "Without attempting to delineate for every

conceivable situation the necessary link between flood control activities and injuries sustained at a flood control project before § 702c immunity applies, in the present case we hold that the requisite nexus has not been established." *Ibid.*[1]

Petitioner contends that the decision below conflicts with *Henderson* and *Boyd*. In this case, however, the government made a stronger showing than it did in those cases of the factual nexus between the government's management of the flood waters and the injury. As the district court explained, the "active presence" of the Coast Guard Auxiliary patrolling the waters of Lake Lewisville "is part of the Government's management of [the lake] and serves to control the waters in a variety of capacities." Pet. App. 18. The court of appeals found that the Auxiliary's water safety patrols were part of the "management of a flood control project," *id.* at 9, and that petitioner's injury occurred during the use of "*flood control waters* involving the *Government's patrol of those waters*." *Ibid.* Although the court recognized that not every aspect of the management of a flood control project would warrant immunity, it held that the government should not be liable under "the facts at hand." *Ibid.*[2]

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[1] The Tenth Circuit subsequently found a sufficient nexus where mist from water released from a dam caused an ice slick on an adjacent road. See *Holt* v. *United States*, 46 F.3d 1000, 1004-1005 (10th Cir. 1995).

[2] The court of appeals left "for another day" the question of whether Section 702c would preclude liability for negligently building roads or hiring staff in connection with "management of a flood control project." Pet. App. 9 (noting the hypothetical example posed by the Seventh Circuit, see *Fryman*, 901 F.2d at 81, of a case in which the Army Corps of Engineers

The issue of whether there is a sufficient nexus between the government's management of flood waters and a particular injury requires a fact intensive inquiry. See *Holt*, 46 F.3d at 1004; *Mocklin*, 877 F.2d at 429-430. See also *Bailey*, 35 F.3d at 1118 (vacating district court's dismissal under Section 702c and remanding for further factual development as to whether injuries had a sufficient nexus to flood control). This Court was aware of some divergence in approaches among the circuits in applying Section 702c when it denied the petition for writ of certiorari in *Hiersche* v. *United States*, 503 U.S. 923 (1992) (Stevens, J., memorandum respecting the denial of certiorari). That situation has not changed. Existing differences in approach, moreover, have not resulted in any marked lack of uniformity of results. In these circumstances, it is not evident that review of this case is needed in order to provide additional guidance to the lower courts in conducting an inherently fact-laden inquiry.

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allowed "a walrus-sized pothole to swallow tourists' cars on the way to the beach").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1995